United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

JANUARY TERM, 1933

No. 5898

336

JOSEPH E. OSBORNE AND CAROLINE M. OSBORNE,
APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 6, 1933.

PRINTED MARCH 7, 1933.

Court of Appeals of the District of Columbia

JANUARY TERM, 1933

No. 5898

JOSEPH E. OSBORNE AND CAROLINE M. OSBORNE, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	*a*	1
Declaration	1	1
Demurrer	4	4
Order sustaining demurrer	6	5
Judgment ordered; judgment	6	5
Appeal noted by plaintiffs and undertaking to act as cost bond fixed with leave to deposit $50 in cash in lieu thereof.	7	5
Memorandum: $50.00 deposited in lieu of bond on appeal	7	5
Assignment of error	8	5
Designation of record	8	6
Clerk's certificate	10	6

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 24, 1933.

Court of Appeals of the District of Columbia

No. 5898.

JOSEPH E. OSBORNE et al., Appellants,

vs.

THE DISTRICT OF COLUMBIA, a Municipal Corporation.

a Supreme Court of the District of Columbia.

At Law.

No. 81708.

JOSEPH E. OSBORNE and CAROLINE M. OSBORNE, Plaintiffs,

vs.

THE DISTRICT OF COLUMBIA, a Municipal Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Aug. 20, 1932.

In the Supreme Court of the District of Columbia.

At Law.

No. 81708.

JOSEPH E. OSBORNE and CAROLINE M. OSBORNE, 801 Monroe Street Northeast, Washington, D. C., Plaintiffs,

vs.

THE DISTRICT OF COLUMBIA, a Municipal Corporation, Municipal Building, Washington, D. C., Defendant.

The plaintiffs, Joseph E. Osborne and Caroline E. Osborne, sue the defendant, the District of Columbia, a municipal corporation, for that the plaintiffs were heretofore, to

wit, at and for a long time prior to the time of the committing by the defendant of the grievances hereinafter mentioned, and still are, lawfully seized and possessed, as joint tenants, of that certain piece or parcel of ground in the District of Columbia described as lot numbered Four (4) in Block numbered Five (5) "West Brookland Park," being part of the tract called "Enclosure," as per plat recorded in the office of the Surveyor for the District of Columbia in Liber County No. 8 at folio 120, of the records of said office, upon which said piece or parcel of land was, at the time of the
2 committing of said grievances by the defendant, and for a long time prior thereto had been, and still is, situated a dwelling house, which, at the time of the committing of said grievances was, and for a long time, to wit, ten years, prior thereto had been, occupied by plaintiffs as a residence; and for that the defendant to wit, on or about the 1st day of March, 1931, began to alter, widen and elevate and did thereafter widen and elevate, a certain bridge then and there existing in and along the roadway of Monroe Street and along the front of the said lot and in front of said house which bridge was and is designed and intended to carry said street and the roadway and the sidewalks thereof and the traffic thereon, over the tracks of the Metropolitan Branch of the Baltimore and Ohio Railroad which then and there crossed said Monroe Street diagonally from Northwest to Southeast, a short distance to the east of said land of the plaintiffs, which said land fronts twenty-three and twenty-eight one-hundredths (23.28) feet on said Monroe Street at the Southeast corner of the intersection of said street with Eighth Street East, and runs back along the east side of said Eighth Street a distance of One Hundred and Thirty-four and Sixty-nine one-hundredths (134.69) feet; and the defendants in the course of said work raised the roadway of said bridge along the front of the said land of the plaintiffs to an unnecessary and unreasonable extent, to wit, to the extent of fifty-seven inches above the height at which it had theretofore been carried by said bridge, and raised a concrete wall along the south side of said bridge, and forming a part thereof and extending above the roadway thereof, to an unnecessary and unreasonable extent, to wit, to the extent of forty-two inches above the height
3 at which it had theretofore existed; and raised the level of the roadway of said Monroe Street to the

westward of said Eighth Street and across the same so as to make an approach to said bridge as so elevated; and thereby obstructed and cut off the view from the front of the said house of the plaintiffs up to the second story thereof and cut off air and light therefrom and has maintained from, to wit, the 23rd day of July 1932, continuously to the present time, and still maintains said bridge and said wall as so unreasonably and unnecessarily elevated and so obstructing and cutting off the view from the front of plaintiffs' said house and so depriving them of light and air, and raised the level of said Eighth Street, along the west side of the said land of the plaintiffs, to the height of, to wit, twelve feet at the front, sloping down to a height of to wit, eight feet at the rear, and piled a sloping bank of loose earth along the east side of said Eighth Street, and the west side of said lot for the entire depth of the said property of the plaintiffs of the height of, to wit, twelve feet at the front of said lot, at said Monroe Street, sloping down to a height of, to wit, eight feet at the rear of said lot, whereby, and because of which in time of rain or melting snow, large quantities of dirt, soil and gravel from said bank and large quantities of water are precipitated to and deposited upon said lot of the plaintiffs and their said house is made damp and unsafe as a place of habitation and whereby plaintiffs are prevented from ingress and egress to and from a garage which prior to the committing of said grievances existed and still exists on the rear of said lot and in which they were and still are accustomed to store their automobile, save by descending and ascending a steep and dangerous embankment; and by reason of the aforesaid wrongs and grievances the defend-

4 ant has and still maintains across the entire front of the said house of the plaintiffs, at a distance of, to wit, only twelve feet therefrom, a solid wall as high as the windows of the second story of said house, and along its entire west side an embankment of the height aforesaid, thereby placing said house at the bottom of a basin or sink; by means of all of which said grievances the defendant for a long time, to wit, since the twenty-third day of July, 1931, has maintained and is maintaining a nuisance, with respect to the defendants and has greatly hindered and interfered with the comfort and convenience of the plaintiffs in the use of their said property and has greatly reduced its desirability as a place of abode and greatly reduced its value

and rendered it unsalable; all to the damage of the plaintiffs in the sum of Ten Thousand Dollars ($10,000.00), wherefore the plaintiffs bring this suit and claim Ten Thousand Dollars besides costs.

MILLAN AND SMITH,
900 *F Street N. W.*,
By W. W. MILLAN,
Attorneys for Plaintiffs.

Demurrer.

Filed Sep. 8, 1932.

* * * * * * *

Comes now the defendant, the District of Columbia, by counsel, and demurs to the declaration filed herein
5 and says the same is bad in substance in that:

(1) Said declaration fails to set forth sufficient facts to constitute a cause of action.

(2) The District of Columbia is not required to respond in damages for the raising or lowering of the grade of an existing street or bridge or for the establishing of grade on non-existing streets.

(3) The District of Columbia was required to reconstruct the Monroe Street bridge and approaches thereto in accordance with the mandate of the United States Congress, and in carrying out the mandate of Congress, the District of Columbia is not responsible for consequential damages to a property owner whose premises may have been damaged by reason of the change of the grade.

(4) The construction of a bridge is a governmental function and the defendant is not liable for damage to adjacent property irrespective of the manner in which the construction of the bridge was performed.

WILLIAM W. BRIDE,
Corporation Counsel, D. C.;
EDWARD W. THOMAS,
Assistant Corporation Counsel, D. C.;
ROBERT E. LYNCH,
Assistant Corporation Counsel, D. C.;
Attorneys for Defendant,
District Building.

6 In the Supreme Court of the District of Columbia.

Monday, November 7, 1932.

Session resumed pursuant to adjournment, Hon. O. R. Luhring, Justice, presiding.

* * * * * * *

Upon consideration of the demurrer filed herein, to the declaration, it is ordered that said demurrer be, and the same is hereby sustained.

Monday, November 14, 1932.

Session resumed pursuant to adjournment, Hon. O. R. Luhring, Justice, presiding.

* * * * * * *

Comes now the plaintiffs by their attorneys of record and notify the Court of their election to stand upon the declaration herein, and it appearing to the Court that a demurrer to said declaration was sustained on the 7th day of November, 1932, judgment is ordered in accordance therewith.

Wherefore, it is considered that plaintiffs take nothing
by this action that defendant go hence without day,
7 be for nothing held and recover of plaintiff its costs
of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiffs by their attorneys of record, in open court, note an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars ($100.00) with leave to deposit Fifty Dollars ($50.00) cash with the clerk in lieu thereof.

Memorandum.

November 30, 1932.—$50.00 deposited in lieu of bond on appeal.

8 *Assignment of Error.*

Filed Jan. 25, 1933.

* * * * * * *

1. The Court erred in sustaining the demurrer to the declaration.

MILLAN & SMITH,
By W. W. MILLAN,
Attorneys for Plaintiffs.

Designation of Record.

Filed Dec. 13, 1932.

* * * * * * *

The Clerk of the Court in preparing the Transcript of Record on appeal in the above-entitled cause will include the following:

1. Declaration.
2. Demurrer.
3. Minute entry of November 7, 1932, sustaining demurrer.
4. Minute entry of November 14, 1932, showing demurrer sustained, election to stand on declaration, judgment entered and appeal noted in open court.
5. Note deposit as security for costs on appeal.
6. This designation.
7. Assignment of error.

MILLAN AND SMITH,
By W. W. MILLAN,
Attorneys for Plaintiffs.

9 Service of copy acknowledged this 10th day of December, 1932.

W. W. BRIDE,
E. W. THOMAS,
R. E. LYNCH,
Attorney- for Defendant.

10 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 9, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 81708 at Law, wherein Joseph E. Osborne and Carcline M. Osborne are Plaintiffs and The District of Columbia, a Municipal Corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of January, 1933.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,

By ALF G. BUHRMAN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5898. Joseph E. Osborne et al., appellants, vs. The District of Columbia, a municipal corporation. Court of Appeals, District of Columbia. Filed Feb. 6, 1933. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR 7 - 1933

Henry W. Hodges
CLERK

Court of Appeals, District of Columbia.

JANUARY TERM, 1933

No. 5898

JOSEPH E. OSBORNE AND CAROLINE M. OSBORNE, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLEE.

BRIEF FOR APPELLANTS.

W. W. MILLAN,
R. E. L. SMITH,
Attorneys for Appellants.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

Court of Appeals, District of Columbia.

JANUARY TERM, 1933

No. 5898

JOSEPH E. OSBORNE AND CAROLINE M. OSBORNE, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLEE.

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from a judgment at law of the Supreme Court of the District of Columbia entered upon a demurrer.

The plaintiffs, husband and wife, claiming as the owners of certain real estate, located at the corner of Eighth and Monroe Streets, Northeast, in the Dis-

trict of Columbia, charged in their declaration that the defendant in connection with widening and elevating a certain bridge in and along the roadway of said Monroe Street, across the front of the property of plaintiffs, and raising the roadway of said Eighth Street, had greatly damaged said property and had created and was maintaining a nuisance.

Defendant filed a general demurrer and the court sustained the same. Plaintiffs elected to stand upon their declaration whereupon the court entered final judgment against plaintiffs and in favor of defendant for costs. Plaintiffs appealed.

The Facts Pleaded.

At the beginning of the wrongs complained of the plaintiffs were, and they still are, owners of a piece of ground at the Southeast corner of Eighth and Monroe Streets, Northeast, in the District of Columbia. It fronts Monroe Street 23.28 feet and runs back along Eighth Street 134.69 feet, and there was then in existence a bridge in and along the roadway of Monroe Street across the front of plaintiffs' property, which is improved by a substantial frame dwelling facing Monroe Street, occupied by plaintiffs as a home. The bridge is designed to carry the roadway of Monroe Street over the tracks of the Metropolitan Branch of the Baltimore and Ohio Railroad, which cross said street from Northwest to Southeast a short distance east of plaintiffs' property.

The defendant undertook to, and did, widen said bridge. It is charged that—

"The defendant in the course of said work raised the roadway of said bridge along the front of the said land of the plaintiffs to an unnecessary and unreasonable extent * * * and raised a concrete wall along the south side of said bridge and forming a part thereof, to an unnecessary and unreasonable extent * * * and raised the level of the roadway of said Monroe Street to the Westward of said Eighth Street * * * and thereby obstructed and cut off the view from the front of the said house of the plaintiffs up to the second story thereof and cut off air and light therefrom * * * and raised the level of said Eighth Street along the west side of the said land of the plaintiffs, to the height of, to wit, twelve feet at the front, sloping down to a height of, to wit, eight feet at the rear, and piled a sloping bank of loose earth along the east side of said Eighth Street, and the west side of said lot for the entire depth of the said property of the plaintiffs of the height of, to wit, twelve feet at the front of said lot * * * sloping down to a height of, to wit, eight feet at the rear of said lot, whereby, and because of which in time of rain or melting snow, large quantities of dirt, soil and gravel from said bank and large quantities of water are precipitated to and deposited upon said lot of the plaintiffs and their said house is made damp and unsafe as a place of habitation * * *; and by reason of the aforesaid wrongs and grievances the defendant has and still maintains across the entire front of the said house of the plaintiffs at a distance of only twelve feet therefrom, a solid wall as high as the windows of the second story of said house, and along its entire

west side an embankment of the height aforesaid, thereby placing said house at the bottom of a basin or sink by means of *all* of which said grievances the defendant * * * has maintained and is maintaining a nuisance."

Assignment of Error.

The court erred in sustaining the demurrer to the declaration.

ARGUMENT.

In the court below appellee cited a large number of cases and it is assumed that they will be relied on in this Court and in anticipation of having to meet them a few of them are noticed here.

In Quinn *vs.* Dougherty, 58 App. D. C. 339, it was sought to enjoin the construction of a fire engine house on land that had been condemned for a park. A single isolated sentence from the opinion was cited as the latest utterance of this Court on the point involved in the pending case. Its applicability is not apparent.

Walker *vs.* The Southern Pacific R. R., 165 U. S. 593, was the ordinary and familiar case of one private owner having the right to stop the flow to his land of surface water from the land of an adjoining owner, and of exactly that character are B. & O. R. R. Co. *vs.* Thomas, 37 App. D. C. 255, decided on the authority of that case, and Pearce *vs.* Scott, 58 App. D. C. 257.

Another group of cases are negligence cases where the right to recover was claimed on the basis of alleged negligence on the part of the municipality in performing some work in connection with streets or other im-

provements, such as District of Columbia *vs.* Gray, 6 App. D. C. 314, where the complaint was that a certain sewer was not kept in proper condition and District of Columbia *vs.* Atchison, 31 App. D. C. 250, where negligence was claimed but not proven.

Frisbie *vs.* Cowen, 18 App. D. C. 381, is cited as showing the doctrine as to surface waters but so far as it has any applicability it is in favor of appellants. The holding was that a railroad company did *not* have the right to accumulate water in ditches along its tracks and divert it to the land of plaintiff using for that purpose a depression or gully not a natural water course.

Transportation Co. *vs.* Chicago, 99 U. S. 635, was much stressed. It is a case where there is much learned discussion of the law governing public improvements, but the pith of the decision is expressed in a few words on page 643, as follows:

> "In this case the coffer dam was only a temporary obstruction. It was no physical encroachment upon the plaintiffs' property and it was maintained only so long as it was needed for the public improvement. The tunnel could not have been constructed without it."

Richards *vs.* Washington Terminal Company, 233 U. S. 546, so far as it has any applicability, favors plaintiffs. It leaves no doubt that recovery may be had for "so direct and peculiar and substantial a burden upon plaintiff's property" (page 557) imposed by an improvement made by a private corporation but under authority and by direction of certain Acts of Congress.

Another group of citations, of which Johnston *vs.* District of Columbia, 118 U. S. 19, is one, establish no more than the familiar doctrine that a municipality is not liable for errors of judgment on the part of its officials. In that case it was claimed that engineers had constructed sewers too small to carry off the water discharged into them. Finally the case of Nottingham *vs.* Railroad Company, 3 MacArthur 517, while it denied recovery for the backing up of surface water by a railroad embankment, expressly declared:

> "Where the injury is a common nuisance it is not a ground of action for damages unless the plaintiff can prove *some injury to himself of a character different in kind from that common injury which he may have sustained with the rest of the public by reason of such nuisance.*" (Italics supplied.)

Having thus summarized the principal authorities cited by appellee in the court below, it is respectfully submitted that unless more conclusive citations shall appear in the brief yet to be written no authority for sustaining the demurrer will have been shown.

Appellants' Points and Authorities.

(1) The suit is not based upon a claim of negligence.

(2) The suit is not based upon an error of official judgment.

(3) The suit is based upon an alleged continuing nuisance caused by the positive act of appellee.

The defendant (appellee) cannot lawfully discharge a governmental function or construct and maintain

any public work in such a manner as to create and maintain a nuisance.

Roth *vs.* District of Columbia, 16 App. D. C. 314.
District of Columbia *vs.* Tyrrell, 41 App. D. C. 463.
Palmer *vs.* District of Columbia, 26 App. D. C. 31.
Miles *vs.* City of Worcester, 154 Mass. 511.
District of Columbia *vs.* Totten, 55 App. D. C. 312.

On page 318 of the report in the Totten case, this Court cites the definition of a nuisance given by the Supreme Court of the United States in B. & P. R. R. Co. *vs.* Fifth Baptist Church, 108 U. S. 317, viz:

"That which renders the ordinary use and occupation by a person of his property uncomfortable to him", and approves a definition quoted from Funk and Wagnalls New Standard Dictionary as follows:

> "That which annoys, vexes or irritates; something offensive or troublesome; an annoyance; a source of annoyance, harm or trouble; anything that by its use or permitted existence works annoyance, harm, inconvenience or damage to another."

We submit that the allegations of the declaration clearly fulfill either of these definitions.

In Miles *vs.* City of Worcester, *supra,* it was said, speaking of the defense of governmental function:

> "We are not aware, however, that it has ever been held that a private nuisance to property can be justified on that ground."

This is no stronger than the language of your Honors in District of Columbia *vs.* Totten, *supra,* and in Roth *vs.* The District of Columbia and Palmer *vs.* The District of Columbia, *supra,* cited in the Totten case, and it is respectfully submitted that on the authority of the Totten case alone the demurrer should have been overruled.

In Pumpelly *vs.* Green Bay Company, 13 Wall. 106, the Supreme Court of the United States said (pp. 180, 181):

> "We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of an individual arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good there is no redress and we do not deny that principle is a sound one, in its proper application, to many injuries to property so originating, but we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, and other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

Such a case is presented by the declaration in the pending appeal, and it is respectfully submitted that the judgment of the lower court should be reversed and the defendant required to plead.

Respectfully submitted,

W. W. MILLAN,
R. E. L. SMITH,
Attorneys for Appellants.

DISTRICT OF COLUMBIA
FILED
SEP 12 1933
Henry W. Hodges
CLERK

No. 5898

In the Court of Appeals of the District of Columbia

JANUARY TERM, 1933

JOSEPH E. OSBORNE AND CAROLINE M. OSBORNE,
APPELLANTS

vs.

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLEE

BRIEF ON BEHALF OF APPELLEE

WILLIAM W. BRIDE,
Corporation Counsel, D.C.,
ROBERT E. LYNCH,
Assistant Corporation Counsel, D.C.,
EDWARD W. THOMAS,
Assistant Corporation Counsel, D.C.,
Attorneys for Appellee.

In the Court of Appeals of the District of Columbia

JANUARY TERM, 1933

No. 5898

JOSEPH E. OSBORNE AND CAROLINE M. OSBORNE, appellants

vs.

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, appellee

BRIEF ON BEHALF OF APPELLEE

SUPPLEMENTAL STATEMENT OF THE CASE

In this brief appellants will be referred to as plaintiffs and appellee as defendant.

The declaration does not allege that any part of the bridge or approaches thereto encroached upon the plaintiffs' property. A careful analysis of the allegations of the declaration is important. The bridge and the roadway of the said bridge are to the east of the plaintiffs' property, and the roadway of the bridge itself was only increased in height less than six feet (R. 2). The approach to the bridge along Monroe Street proper was only raised

8417—33——1

three and a half feet (R. 2). The declaration does not specifically state that this approach is in front of plaintiffs' property, although the pleader inferentially attempts to allege such to be the fact, and for the purpose of this brief it will be assumed that the approach is in front of the plaintiffs' property and was raised to the maximum of three and a half feet. That part of the declaration appearing on page 3 of the record, and dealing with 8th Street, cannot strengthen the plaintiffs' case for the reason that the declaration does not state what the preexisting levels of the roadway were. That is, the declaration alleges defendant "raised the level of said 8th Street, along the west side of the said land of the plaintiff, to the height of, to wit, twelve feet at the front, sloping down to a height of, to wit, eight feet at the rear." Was this an increase of one foot or one inch in the height of the roadway? Plaintiffs do not state that their property was level with the grade of 8th Street before the public improvement was undertaken. In view of the fact that definite figures were given as to the increase of the roadway on Monroe Street, it may be assumed that the increase was less on 8th Street, otherwise the plaintiffs would have stated the strongest case possible, particularly where the trial court always grants permission to amend the declaration upon an adverse ruling to the plaintiffs on a demurrer. Plaintiffs' counsel is equally careful not to state how close the solid wall was to the

plaintiffs' property before the public improvement. On page 3 of the record the declaration states that it now is twelve feet from the plaintiffs' house. Was it eleven and a half feet prior to the improvement? If there was a substantial change why did not the plaintiffs affirmatively allege that fact?

ARGUMENT

I

Any damage resulting from the construction of the bridge is consequential and damnum absque injuria

The original bridge over Monroe Street, at this point, was authorized by the Act of Congress of February 28, 1903 (32 Stat. 909), known as the Union Station Act, and eliminating grade crossings in the lines of the steam railroads. The Act of Congress of March 2, 1907 (34 Stat. 1222), authorized the extension of Monroe Street for the elimination of grade crossings "upon a practical grade." The Appropriation Act of Congress of 1908 (34 Stat. 1119, 1130) provided—

> For constructing a suitable bridge to carry Monroe Street, Brookland, over the tracks of the Baltimore and Ohio Railroad; all in accordance with plans approved by the Commissioners of the District of Columbia, forty-four thousand dollars * * *, and the said Commissioners are authorized to enter into a contract with the said railroad company or other parties for the construction of such bridge and approaches.

Congress directed the reconstruction of Monroe Street Bridge by its Act, approved July 3, 1930 (46 Stat. 949, 962), which provided—

> For the reconstruction of a viaduct or bridge and approaches thereto to replace the existing viaduct in the line of Monroe Street Northeast over the tracks and right-of-way of the Baltimore and Ohio Railroad Company, in accordance with plans and profile of said work to be approved by the Commissioners of the District of Columbia, including purchase or condemnation, under Chapter 15 of the Code of Law for the District of Columbia, as amended (45 Stat., p. 1437), of necessary land, construction of and changes in sewers and water mains, personal services, and engineering and incidental expenses, $135,000.

Thus it will be seen that the plaintiffs are attempting to collect damages from the Municipality because the Commissioners, acting under the mandate of Congress, reconstructed a bridge as authorized and directed by Congress. There is no allegation that the reconstruction of the bridge and its approaches was unnecessary or that the height was not a "practical grade." The averment of the pleader that the bridge and approaches were raised "to an unnecessary and unreasonable extent" is a pure conclusion and not an allegation of fact. Can it be said that after the expiration of thirty years and the increased size of locomotives and the overwhelming increase in the vehicular traffic that the

raising of a bridge at its maximum point to less than six feet and raising the approach three and a half feet is an unnecessary and unreasonable extent?

The conclusion in the declaration that the existing condition amounts to the maintenance of a "nuisance" is not sufficient to establish liability against the Municipality. The mere use of the word "nuisance" without alleging sufficient facts which constitute a nuisance cannot create a legal liability on the defendant.

If plaintiffs' contention is correct, then the District of Columbia must respond in damages to all property owners abutting a raised or lowered street. Such a rule would place an intolerable burden on the taxpayers.

The sane and right rule is that any inconvenience or consequential damage sustained by an individual must be borne in the interest of the entire community. The decided case sustain this view.

Generally a private nuisance is an act or series of acts unaccompanied by a trespass, and being an unwarrantable, unreasonable, or unlawful use by a person of his own property to the injury of another. To maintain such an action facts must be set forth showing a breach of duty or setting up negligence.

As a matter of law, bridges built or rebuilt by public authority, are highways.

Stoppenbach v. *Multnohah County*, 71 Oreg. 493.

Bigelow v. *Worchester,* 169 Mass. 390.
Nims v. *Boone Co.,* 66 Iowa 273.
Carter v. *Band R.R. Co.,* 139 Mass. 525.

The Supreme Court of the United States in *Sauer* v. *New York,* 206 U.S. 536, 544, said:

> " The bridge is just as much a public highway as is Main Street with which it connects; and whether we consider the approach as a part of the former or of the latter, it is merely a part of the highway. * * * it was necessary to connect it for purposes of travel * * *. This it has done in the only way it could have been done, by what in effect, amounts merely to raising the grade * * *. It can make no difference in principle whether this was done by filling up the street solidly, or as in this case, by supporting the way on stone or iron columns. Neither is it important if the city raise the grade of only a part of the street leaving the remainder at a lower grade."

* * * * *

> "The doctrine of the courts everywhere * * * is that so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully and not negligently performed, does not impose an additional servitude upon the street and hence is not within the constitutional inhibition against taking private property without compensation, *and is not the basis of an action for damages, unless there be an express statute to that effect."*

The same Court in referring again to inconvenience suffered through interference with private view, light and air, or access as a result of lawful constructions said in *Camfield* v. *United States,* 167 U.S. 519, 523:

> * * * a man has no right to maintain a structure upon his own land, which by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery, or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable, or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.
>
> It is true that a man may build a fence upon his own land as high as he pleases, even though it obstructs his neighbor's lights, and the weight of authority is that his motives in so doing cannot be inquired into, even though the fence be built expressly to annoy and spite his neighbor.

A case strikingly in point is that of *Smith* v. *Corporation of Washington,* 20 Howard 135, 15 L. ed. 858. The case involved the right of action for the lowering of the grade of K Street, in the District of Columbia. The suit was against the District of Columbia for regrading K Street. The street was originally graded in front of plaintiff's premises in 1832 and regraded in 1851. It was because of the change of grade in 1851 that the suit was based.

The Supreme Court of the United States, in its opinion stated the facts as follows:

> The declaration in this case alleges, in substance, that the plaintiff is owner of a lot in the City of Washington, fronting on K Street; that this street was opened in front of her lot in the year 1831, and became a traveled street; that a wall had been erected in front of the lot, to protect it; that shade trees had been planted in front of it; that a sidewalk had been laid; "that defendants unlawfully, wrongfully, and injuriously" cut down the shade trees, took down the wall, removed the pavement, and dug down the street in front of the premises, thereby obstructing and injuring the ingress and egress to the plaintiff's lot and the buildings thereon—injuring their value, depriving her of the shade and ornament of the trees, and compelling her to pay large sums of money to enable her to use and occupy her house.

The Supreme Court so clearly covers the point raised in that case, which is applicable here, that the defendant is taking the liberty of quoting from the opinion in extenso:

> Having performed this trust, confided to them by law, according to the best of their judgment and discretion, without exceeding the jurisdiction and authority vested in them as agents of the public, and on land dedicated to public use for the purposes of a highway, they have not acted "unlawfully or wrongfully", as charged in the declaration. They

have not trespassed on the plaintiff's property, nor erected a nuisance injurious to it, and are, consequently, not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public. The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendants is not "unlawful or wrongful", they are not bound to make any recompense. It is what the law styles "damnum absque injuria." Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of that of the public.

The law on this subject is well settled, both in England and this country. The cases are too numerous for quotation; a reference to one or two more immediately applicable to the questions arising in this case will be sufficient.

In *Callender* vs. *Marsh* (1 Pick. 417) the defendant, as surveyor of the highways, was charged with digging down a street in Boston, so as to lay bare the foundations of the plaintiff's house and endanger its falling. The authority under which he acted was given by a Statute which required "that all highways, townways, etc., should be kept in repair and amended from time to time, that the same may be safe and convenient for travelers." "This very general and exclu-

sive authority" say the court, "would seem to include everything which may be needed towards making the ways perfect and complete, either by leveling them where they are uneven and difficult of ascent or raising them where they should be sunken and miry." It was held, also, that the law does not give a right to compensation for an indirect or consequential damage or expense, resulting from a right use of property belonging to the public.

In *Green* vs. *The Borough of Reading,* 9 Watts, 382, the defendants, by virtue of the authority to "improve and repair", graded the street in front of plaintiff's house five feet higher than it had been before, and it was held that the Corporation was not liable to an action for any consequential injury to plaintiff's property, by reason of such improvement or change of grade in the public street.

In the case of *O'Connor* vs. *Pittsburg,* 18 Pa. 187, a church had been built according to the direction of the City Regulator, and by a grade established in 1829. Afterwards, in pursuance of an ordinance, the grade of the street was reduced seventeen feet; the church had to be taken down and rebuilt on a lower foundation, at a damage of $4,000. The authority given to the City was "to improve, repair, and keep in order the streets", etc.

The court say: "We had this case reargued, in order to discover, if possible, some

> way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only in Pennsylvania, but by every decision in the sister States, except one."
>
> We are of opinion, therefore, that the instructions given by the court below on these points were correct, and affirm their judgment.

One of the earliest cases which held the city may change the grade of a street is that of *Goszler* vs. *Georgetown* (6 Wheat. 593, 5 L. ed. 339). The opinion is by Chief Justice Marshall. The suit was one in equity to restrain the Corporation of Georgetown from changing the grade of the street. The Bill was dismissed, and the decision was affirmed by the Supreme Court of the United States. After holding that the Corporation of Georgetown could change the grade of the street the court said:

> Although this power may be oppressively repeated, the possession of it cannot be pronounced so improper or so dangerous as to control, essentially, the words which confer it. The graduation and leveling of the streets, is not, necessarily, a single operation. There may be circumstances to produce a general desire to vary the graduation, to bring the streets more nearly on a level than was contemplated in the first ordinance, and, if this may occur, we cannot say that the legislature could not intend to give this power of varying the graduation, when the words they employ are adapted to the giving of it.

The Supreme Court in *Dainese* v. *Cooke,* 91 U.S. 580, and this court in *Hutchins v. Munn,* 22 App. D.C. 88, held there are no property rights in light and air.

This court in *Hutcherson* v. *District of Columbia,* 39 pp. D.C. 512, and *Pearce* v. *Scott,* 58 App. D.C. 257, held the construction of roadways on one's land is lawful and furnishes no basis for a suit for damages.

ARGUMENT II

No facts are alleged in the declaration that the defendant is doing any act or that its agents or employees are engaged in activities so as to constitute a nuisance

Plaintiffs state the suit is not based on claim of negligence, or upon any error of official judgment on the part of defendant, but say it "cannot lawfully discharge a governmental function or construct and maintain any public work in such manner as to create and maintain a nuisance" (Plaintiffs' Brief pp. 6 and 7). In law no action lies for mere change in grade of public streets, interference with light, air, view, or access to property through the construction of public works. The defendant can be held liable in this case only if some breach of duty is alleged to support the charge that in reconstructing Monroe Street Bridge the defendant caused some special injury to plaintiffs. It must be remembered the reconstruction of the bridge was authorized by an Act of Congress.

The declaration is laid in nuisance, but plaintiffs claim trespass and taking of property without compensation also. Assuming for the sake of argument the declaration should be so considered as being brought under authority of the Federal Constitution, the liability on the part of the District could only arise for absolute deprivation of the use of plaintiffs' property.

Thus in *Hutcherson* vs. *District of Columbia,* 39 App.D.C. 512, this Court in discussing the question of consequential damages in relation to the construction of street bridges and approaches, said at pages 514, 515, and 516:

> * * * the Act of 1905 expressly authorized the Commissioners to reconstruct the bridge * * *. The provision authorizing the acquisition of such land as might be necessary to provide such approaches did not preclude the Commissioners from using land already owned * * *. The purpose of the bridge was for public travel, and that purpose could be subserved only by connecting the ends of the bridge with streets. If in raising the grade at either end, more land was necessary, authority was granted the Commissioners to acquire it, but they were not obliged to do so unless they deemed it necessary.
>
> * * * * *
>
> In the present case there is no claim of negligence, nor is there any contention of an actual invasion of appellant's land. * * *

> Between the 50 feet of appellant's property facing on 11th Street and the retaining wall in that street is a roadwork and sidewalk. It is thus apparent that in front of appellant's property is a means of ingress and egress. * * * Appellant complains therefore, because 11th Street has been raised opposite his premises, at a distance therefrom of over 16 feet, notwithstanding that he has practically the same accommodations as heretofore. It is apparent without further argument, we think, that the injuries complained of are purely consequential. A different case would have been presented had the location of appellant's property been such that the erection of this retaining wall isolated it and prevented its further use.

There is no claim in the instant case that plaintiffs' property is useless or that they are ousted of possession. Does the surface water from the embankment (not the roadways or the concrete wall) constitute a nuisance as defined in the *Fifth Baptist Church, supra,* or the *Roth* and *Totten cases* relied on by plaintiffs? These cases and similar ones are illustrative of the fact that something was brought upon the offending property or activities engaged thereon which were independent of the property itself. The only independent use of the bridge and its approaches here was by the public as a highway. All the cases cited by the Court in the *Totten case* (55 App. 312) including that of *Mayor of Cumberland* v. *Willison,* 50 Md. 138, are in that

category. They involved acts of smoke emission, escaping gas or odors, or other activities maintained on the premises. None of those conditions are alleged to exist as a nuisance in this case. The mere construction of a bridge and its use which might make a municipal corporation liable to abutting property owners for damages is illustrated by the facts in the case of the *Brennan Construction Co.* v. *Cumberland,* 29 App.D.C. 554, where this Court held that damages must be made good which are occasioned by the escape of a substance brought onto the property by the owner which "if permitted to escape is certain to injure others." There petroleum was so deposited by the construction company on its own property that it found its way to the river, damaging boats and docks. No analogy can be drawn to surface water falling on an embankment which supports the public highway. In *Cumberland* v. *Willison, supra,* cited in the *Totten case,* independent acts of city employees were present consisting in flushing the highway with water from fire plugs and sweeping the same, including sediment, in such a manner that the water flowed on private property. On the other hand, this case states the law to be, as contended by defendant, conclusive of the fact of nonliability in the present case. The Court in the *Willison case, supra,* said pages 149, 150:

> as respects *surface water,* if the damage has resulted solely as a consequence of the proper

> execution of a legal power by the corporation, it falls within the general principle and there is no liability therefor, and hence it has been held that as the owner of property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises * * * *so municipal authorities may exercise their powers in respect to the graduation, improvement, and repair of streets without being liable for the consequential damages caused by surface water to adjacent property.*

Therefore when this Court declared in the *Totten case, supra,* page 316:

> for a nuisance maintained on its property, the same liability attaches against a city, as to an individual

it did not refer to surface water causing "incidental injury to the rights of private property" or an overflow amounting to a *taking* of property, *Chicago, B. & O. R. Co.* vs. *Illinois,* 200 U.S. 561, 50 L. Ed.—596, when the Court stated, pages 593, 594:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury does not attach under the Constitution.

(See cases there cited.)

ARGUMENT III

The District of Columbia owes no duty to the plaintiff to restrain street water from overflowing adjacent property

As stated by this *Court in District of Columbia* v. *Atchison,* 31 App.D.C. 250, 261,

> The District is not liable for consequential damage caused by the change of grade of a street unless the work be done in a negligent manner, in which case it would be liable for the injury caused by its negligence.

There is no negligence charged here so that the mere existence of an embankment lawfully erected and which in no way changes the natural flow of water falling on it does not render the Municipality liable for consequential damages. *Ettor* v. *Tacoma,* 228 U.S. 148. In short, the defendant has done only that which it had a right to do, which right has been recognized by this Court in *Pearce* v. *Scott,* 58 App.D.C. 257, in which an adjoining lot owner raised the surface level for roadway purposes so that surface water was thrown back on the remaining lot without incurring liability. It was held there (citing *Walker* v. *Railroad Co.,* 165 U.S. 593; *B. & O. R. Co.* v. *Thomas,* 37 App.D.C. 255 and *B. & P. R. Co.* v. *Fifth Baptist Church,* 108 U.S. 317):

> In the present case the defendant has not built an obstruction in a * * * narrow channel, nor has he made an unreasonable use of his land. * * * his act being law-

> ful, it furnishes no basis for a suit for damages.

That is to say, as stated in the case of *Franklin* v. *Fisk,* 13 Allen (Mass.) 211; 90 Am. Dec. 194—

> Owner of land abutting a highway may lawfully do any act on his own land to prevent surface water from coming thereon from the highway * * * providing he stays on his own land.

ARGUMENT IV

The case of "Pumpelly vs. Green Bay Company" 13 Wall. 106, is not applicable

The declaration in the case at bar alleges that in time of rain or melting snow large quantities of dirt, soil, and gravel from the bank are precipitated to and deposited upon the said lot of the plaintiffs. There is no allegation in the declaration (R. 3) that prior to the reconstruction of this bridge the conditions now complained of did not exist. It is perfectly apparent from a careful reading of the declaration that both Monroe and 8th Streets were substantially above the plaintiff's property before the reconstruction of the bridge. The wall along Monroe Street, according to the declaration, obscures the view from the plaintiff's house up to the second story. Was not a large portion of this view also obscured prior to the reconstruction of the bridge? If it were not, why did not the plaintiffs so allege in the declaration?

In the *Pumpelly case, supra,* the plaintiff's land was rendered useless due to the large quantities of water superimposed thereon by artificial means.

It should also be particularly noted that there was a State statute authorizing a recovery in the *Pumpelly case,* and there was a complete submerging of the plaintiff's land.

The Supreme Court of the United States, in a more recent decision, *Scranton* vs. *Wheeler,* 179 U.S. 141, at page 154 said:

> It was observed * * * that the extremest qualification of the doctrine was that found in Pumpelly's case and that case was referred to as holding nothing more than that the "permanent flooding of private property may be regarded as a 'taking'," because there would be * * * "a practical ouster of his possession."

In the *Passaic River Bridge case,* Appendix, 16 L.Ed. 799; 3 Wallace 782, the Court said:

> The court has no power to arrest the course of public improvements on account of their effects upon the value of property, appreciating it in one place and depreciating it in another.

CONCLUSION

The judgment of the lower court should be affirmed. Congress authorized the reconstruction work, and the defendant had the power to direct that the work be done, the object of which was to

meet conditions of public travel in the elimination of a grade crossing. The declaration alleges no facts showing maintenance of a nuisance, nor any taking of property "beyond incidental injury to rights of private property from the exercise of governmental powers, lawfully and reasonably exerted for the public good." *Chicago R. Co.* vs. *Illinois*, 200 U.S. 561.

Respectfully submitted.

WILLIAM W. BRIDE,
Corporation Counsel, D.C.,
ROBERT E. LYNCH,
Assistant Corporation Counsel, D.C.,
EDWARD W. THOMAS,
Assistant Corporation Counsel, D.C.,
Attorneys for Appellee.

U. S. GOVERNMENT PRINTING OFFICE: 1933